Supreme Court of Minnesota.

STREISSGUTH ET AL.
v.
NATIONAL GERMAN-AMERICAN BANK.

When a bank receives a draft for collection, it enters into an implied contract to perform such duties as are necessary for the protection of the customer.

A bank is not exempt from the principle of law, that every person is liable for the acts of such agents as he appoints to transact the business he undertakes to perform.

Appeal from District Court of Ramsey County; BRILL, Judge.

The complaint set forth that the defendant was a banking corporation organized and doing business in St. Paul, Minnesota, as a national bank, and that the plaintiffs were merchants, copartners engaged in business at St. Paul. That it had been the custom and usage of the defendant for more than five years past to receive from its customers and patrons, among whom were the plaintiffs, for collection and to collect for them, all drafts and checks left with it for collection, and in collecting the same from parties at a distance, to transmit the same to the correspondents and agents of the defendant, located and doing business in the vicinity of and generally nearest to the party or parties from whom such collections were to be made. In November, 1888, the plaintiffs drew their draft upon Kelley and Riley, merchants at Lake Crystal, Minnesota, for the sum of one hundred and thirty-seven dollars and fifty-two cents, payable at sight, and delivered the same to the defendants for collection, who agreed to collect the same, the draft being made payable to their order. The defendant forwarded the draft to its correspondent and agent, the State Bank at Lake Crystal, for collection, who presented the same and received the amount therein stated to be paid. After the amount had been paid to the Lake Crystal Bank, it became insolvent, and never paid and was wholly unable to pay the amount or any part

thereof. The plaintiffs had made repeated demands for payment of the sum collected, but the defendant refused to pay, and this action was brought to recover the amount of the draft together with interest, costs and disbursements.

The defendant denied that it had been its custom to collect all checks and drafts left with it for collection, or to guarantee the collection thereof, or to do more than use due diligence and exercise ordinary prudence in making efforts to collect the same, and also, that it ever had any correspondents or agents for the transaction of such business, but, whenever such paper was received for collection, it had forwarded the same to the nearest bank of good standing and credit to the party or parties from whom such collections were to be made, and if collected, to receive the proceeds of said drafts or checks and pay them over to their customers, or carry the proceeds thereof to the credit of customers on their books, as directed. Defendant also denied that the State Bank was its agent, and alleged that at the time the draft was forwarded it was a State bank of good standing and credit, and averred the exercise of ordinary care and prudence, and that the collection was in its ordinary course of business. There was also a denial of the receipt of any consideration whatever, such collections being merely for the convenience of customers.

The Court found that the State Bank at Lake Crystal was the sub-agent of the defendant, and that the defendant was liable for its default in failing to pay over the money collected by it, and gave judgment for the plaintiffs.

J. B. & W. H. Sanborn, for appellant.

Young & Lightner, for respondents.

COLLINS, J., Feb. 24, 1890. The single question presented by this appeal is whether a bank, with which a customer has left for collection his draft upon a party residing at some distant point, can be held responsible for the failure and default of a correspondent to whom the bank has forwarded the draft for collection. It must be admitted that there is apparently a great conflict of precedents upon this precise ques-

tion, and it is possible that, as contended by the appellant, the weight of the authorities, numerically speaking, is with the proposition that when, under such circumstances, a bank has exercised ordinary care and prudence in the selection of a correspondent to whom it transmits a draft, bill, or note for collection, and remittance of the proceeds, its liability terminates, because, as it is necessary and customary, and in the usual course of business, for banks to collect through correspondents, of which necessity, custom, and course of business the owners and holders of paper have full notice and knowledge, it must be held that they have assented to, and authorized the work of collection through others. The question involves a rule of general application and of commercial law. As it concerns trade between different and distant places, and, in the absence of a statute or contract or usage which has obtained the force of law, is not to be determined according to the views or interests of any particular persons, classes, or localities, it should be decided according to those principles which govern and best promote the general welfare of the entire commercial community, and in accordance with the general principles which apply to all who contract to perform a service.

When the appellant received the draft for collection, it entered into a contract, by implication, to perform such duties as were necessary for the protection of its customer. It agreed to collect the paper itself, not to procure the services of another to make the collection. The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and banking-houses should be excepted from the operation of a cardinal and well-established principle of law that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor who, having unrestrained liberty so to do, has designated a sub-agent, and is therefore answerable for his neglect, failure or default. It is true that in the adjudicated

cases cited by the appellant strong arguments are found, and cogent reasons stated, in support of its position; but we are of the opinion that the conclusion we have reached is the sounder one upon principle. It is also sustained by the Supreme Court of the United States, and the courts of last resort of several of the States, including that of the great commercial center, New York. It is also the rule in England: *Exchange Nat. Bank* v. *Third Nat. Bank* (1884), 112 U. S. 276; *Allen* v. *Bank* (1839), 22 Wend. (N. Y.) 215; *Ayrault* v. *Bank* (1872), 47 N. Y. 570; *Simpson* v. *Waldby* (1886), 63 Mich. 439; *Titus* v. *Bank* (1871), 35 N. J. Law, 588; *Reeves* v. *Bank* (1858), 8 Ohio St. 465; *Tyson* v. *Bank* (1842), 6 Blackf. (Ind.) 225; *Express Co.* v. *Haire* (1863), 21 Ind. 4; *Mackersy* v. *Ramsays* (1843), 9 Clark & F. 818; *Van Wart* v. *Woolley* (1824), 3 Barn. & C. 439.

Judgment affirmed.

The law upon the question of the liability of a bank for the acts of its correspondents is in an unsatisfactory state, yet it would seem that the principal case, although not supported by the weight of authority declares the better law.

It is a general rule of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them: Story on Agency § 452. The maxim is "*respondeat superior*," and as expressed by Lord Chief Justice KENYON in *Ellis* v. *Turner* (1800), 8 Term. 533,—"The defendants are responsible for the acts of their servants in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect their duty to them:" This liability of the principal for the misfeasances, and negligences, and torts of his agents and servants, extends not only to the injuries and wrongs of the agent who is immediately employed by the principal in a particular business, but also to the injuries and wrongs done by others, who are employed by that agent under him, or with whom he contracts for the performance of the business; for the liability reaches through all the stages of the service: Story, § 454.

The law, as thus defined, was applied in the principal case to a bank, with which a customer had left for collection, his draft upon a party residing at a distance. In principle,

as well as theory, it would seem that such decision is correct, for the maxim, *respondeat superior*, is of universal application, and *qui facit per alium facit per se*, is the rule applicable to all cases in which one engages another to perform an undertaking or a service for him. Notwithstanding this, however, the courts in this country are much divided in opinion upon the question, and numerically speaking, their decisions may be said to be against the principle above laid down; so much so, that only five of the States support this ruling; yet the fact must not be lost sight of, that their decisions although in the minority are supported by the Supreme Court of the United States.

The theory contended for by the bank in the principal case, and supported by the majority of the decisions in the State Courts, is, that a home bank, receiving from its customers foreign paper for collection, is relieved from liability, if, in the selection of its correspondents to whom it entrusts its business, it exercises due care and prudence, and gives proper instructions to collect and remit.

The courts which support the latter doctrine do so on the ground, that the customer has a perfect knowledge of the usage and custom of banks, that correspondents will be selected, and impliedly authorizes the employment of a sub-agent, and that being so selected and employed, there is a privity between the customer and the sub-agent, which relieves the bank first intrusted from all liability. They likewise draw a distinction between the case of a home and that of a foreign bill. They admit that in the former case the bank would be liable for the acts and defaults of its servants or agents to whose care such paper is consigned for collection, yet deny that the same principles of law should govern the latter case, and that upon the ground of usage and knowledge and implied authority as above stated. It is submitted that such distinction is not feasible and that it is contrary to all sound principles of law. Why should a person be made liable for the acts of his agents or servants in one case and not in the other? It would seem that the foreign correspondent is as much the agent of the bank as one of its home officers is. In each case the bank employs some agent or servant to transact its business, and therefore the same principles ought to apply in both cases.

The question of consideration has been urged as an answer to this theory, and on this ground, namely, that in the case of a home bill, the bank receives the commission on collection, while in that of a foreign one the correspondent receives it; thus in *Titus & Scudder* v. *The Mechanics' National Bank* (1871), 35 N. J. Law (6 Vroom.) 588, it was relied upon by the defendant, but the Chancellor held the point was not well taken as "the consideration set forth and proved that the plaintiffs were dealers in the bank, and kept their deposits there, and gave their checks upon New York, by which the defendants had the advantage of the rate of exchange, or the greater value of funds in New York than at Trenton is a sufficient consideration." In the case of *Allen* v. *The Merchants Bank of the City of New York*, *infra*, page 644, the same doctrine is upheld, and in the case of *Exchange National Bank* v. *Third National Bank of the City*

of New York, *infra*, page 647, the theory is supported by the Supreme Court of the United States. There would therefore seem to be no reason for holding the want of consideration a defense to such an action.

The question may be looked at from another point of view, namely, that of an attorney at law, or a collection agency. In these cases the law is well defined. They are liable for the acts of their correspondents to whom they transmit debts for collection, unless, as in the case of *Bullitt* v. *Baird* (1870), 28 AMERICAN LAW REGISTER N. S. 546, they expressly limit their liability by their receipt: *Pollard* v. *Rowland* (1826), 2 Blackf. (Ind.) 22; *Bradstreet et al.* v. *Everson et al.* (1872), 72 Pa. 124. It is difficult to conceive why the case of a bank should be looked at in a different light, for its position is in all points similar to that of an attorney and a collection agency. They both undertake to transact the same business, namely, the collection of money due from one person to another. That no such distinction really does exist, is clearly pointed out by the dissenting opinion of Chief Justice CAMPBELL in *Third National Bank of Louisville* v. *Vicksburg Bank* (1883), 61 Miss. 112: "It seems to be well settled that a collection agency which takes a claim for collection at a distant point, is responsible for the acts of its agent to whom the claim is sent for collection. I am not able to draw a distinction between a collection agency, by that name, and a bank, which is a collection agency, where it undertakes to collect claims for customers;" and by the case of *Hoover* v. *Wise et al.* (1876), 1 Otto, (91 U. S.) 308, where the action was brought to recover back a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy. It appeared that an account was delivered by its owners to a collecting agency in New York, and received by them, with instructions to collect; that they transmitted the claim to a firm of practicing attorneys in Nebraska, who persuaded the debtor, notwithstanding the acts of bankruptcy, to confess judgment, which he did, and the money was collected and remitted to the agents in New York, but never paid to defendants. The debtor was declared bankrupt within four months after such confession and the attorneys were aware of his condition at the time. Justice HUNT delivered the opinion of the Court and after reviewing the authorities remarked: "The cases show that where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the note. It is not perceived that it can make any difference that such collection agency is composed of individuals, instead of being an incorporation. These authorities go far towards establishing the position that Archer & Co. [the collection agents] in the case before us were independent contractors, and that the parties employed by them were their agents only and not the agents of [defendants] in such manner that [defendants] are responsible for their negligence or chargeable with their knowledge. * * We are of opinion that these authorities fix the rule in the class of cases we are now considering, to wit: that of attor-

neys employed not by the creditor, but by a collection agent who undertakes the collection of the debt. They establish that such attorney is the agent of the collecting agent, and not of the creditor who employed that agent.

A distinction has been drawn by the Courts between those cases in which the bank receives the paper merely for the purpose of transmission, and those in which it has received it for collection. They hold that in the former case the fact of receiving the documents for transmission for collection only, limits the responsibility to good faith and due discretion in the choice of an agent, while in the latter their opinions differ.

The question therefore would seem to be one of contract, namely, what is the real contract entered into between the parties? Is the contract only for the immediate services of the agent, and his acting faithfully, or, does it look to the thing to be done? If it be for the former, then responsibility ceases with the limits of the personal services undertaken, while if the latter, it covers all necessary and proper means for accomplishing the object, by whomsoever used or employed: *Allen* v. *The Merchants' Bank of the City of New York*, *infra*, page 644; *Titus & Scudder* v. *The Mechanics' National Bank*, *infra*, page 643; *Exchange National Bank of Pittsburgh* v. *Third National Bank of the City of New York*, *infra*, page 647; *The Bank of Washington* v. *Triplett & Neale*, *infra*, page 656; *The Mechanics' Bank of Philadelphia* v. *Earp*, *infra*, page 654; *Bellemire* v. *The Bank of the United States*, *infra*, page 654; *Wingate* v. *The Mechanics' Bank*, *infra*, page 655; *and Merchants' National Bank of Philadelphia* v. *Goodman*, *infra*, page 656.

Notwithstanding these distinctions have been so clearly defined, they do not seem to be fully understood or followed by the Courts of some States, especially those of Illinois. This is indicated by the the case of *The Ætna Insurance Co.* v. *The Alton City Bank*, *infra*, page 650, the agreed facts of which showed that the bill in question was "received for collection," and not merely for "transmission for collection," in which light it was treated by Justice WALKER who referred to the cases, *The Bank of Washington* v. *Triplett & Neale; Allen* v. *The Merchants' Bank of New York City*, *infra*.

In many cases, the negligence complained of, has been that of a notary employed by the bank, and the point has been successfully taken, that for such acts, the notary being a commissioned public officer appointed by the executive authority of the State, the bank was not liable. Here, again, the authorities differ, some cases drawing a distinction where such laches were committed by him in that part of his office which is peculiarly official, holding that in such case alone would the bank be relieved from responsibility: *Allen* v. *The Merchants' Bank of New York City*, *infra*, page 644, in these words: "If this *laches* had been committed by that officer in that part of his duty which was peculiarly official, and could only be performed by himself or some other notary, he having been requested or instructed to perform such duty, I doubt whether the collecting bank or any other institution or person employing him, would be responsible for

his neglect in that which was not voluntarily confided to him, but wherein his official duties were rendered necessary by the requirements of the law; and where his employer had done all that was within his power for the performance of the original undertaking. Then it would seem that the notary would alone be responsible."

In considering this subject which involves principles governing a wide range of commercial interests, sight must not be lost of the question of public policy. Upon this phase of the question, Senator VERPLANCK, in *Allen* v. *Merchants Bank of New York*, *infra*, remarks: "I cannot but think that if the law of this case were now to be settled, not judicially, but legislatively, upon considerations of public policy alone, the doctrine I have maintained * * would be found the safest and wisest. If the present judgment be affirmed, no small doubt will be thrown upon the responsibilities of collecting banks and bankers, even in domestic collections, for the acts of any of their officers. As in the case of corporate banks, or those under our general law, all the business is practically done by agents, that doubt would cover the whole of our banking transactions. The same difficulty may arise in numerous analogous commercial affairs, the law as well as the usage of which is now settled, unless it be shaken by the influence and authority of decisions and reasoning like that of the Supreme Court in this case. On the other side, if we hold collecting banks and bankers, to be liable for all neglect or omission of the necessary and proper means for the due performance of that which they have in general terms undertaken to do, whether such omission or negligence be their own or that of others in their employ, we preserve that harmony of the law which is so essential to its being understood by those who are to regulate their dealings by it; and unquestionably much doubt and litigation will be excluded. If the responsibility thus imposed be onerous or inconvenient as to foreign bills, or to any special class of transactions, it is very easy for banks and bankers to avoid that inconvenience by stating the terms upon which they will receive the deposited paper."

The English cases establish the doctrine of principal and agent between the parties, and hold the bank liable for all acts of its subagents: *Mackersy* v. *Ramsays* (1843), 9 Cl. & F. 818; and *Van Wort* v. *Woolley and others* (1824), 3 B. & C. 439; which are much relied on by the Courts in this country. In the former case it appeared that the defendants in the way of their business as bankers, were employed, for reward, by a customer with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta payable to their order. The defendants employed agents, who in turn employed others; the bill was duly paid to the latter, who after giving their direct employers credit for it, became bankrupt. The Court held the defendants liable. Lord CAMPBELL, thus stating the law: "The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by

[the agent] whose correspondents actually received it, and credited them with the amount * * before their failure." To Lord COTTENHAM'S mind, it was "not necessary to go deeper than to refer to the maxim "*qui facit per alium, facit per se*," to solve the question. In the latter case, Chief Justice ABBOTT proceeded as follows: "Upon these facts, it is evident that the defendants (who cannot be distinguished from, but answerable for their London correspondents * *) have been guilty of a neglect of duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is therefore entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect."

The *Indiana* courts hold the bank liable, and follow the English cases. In *Tyson* v. *The State Bank of Indiana* (1842), 6 Blackf. (Ind.) 225, the bank, through one of its branches, had undertaken to collect the plaintiff's debt, but neglected to do so, and the Court held it liable, Justice SULLIVAN saying: "The State Bank, through one of its branches, having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the situation of an agent or attorney, who, for reward, undertakes to perform services for another in the the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect." In *The American Express Company* v. *Haire and others* (1863), 21 Ind. 4, the bill was a foreign one, and was handed to the company for collection. The company handed it to the notary who failed to demand and protest the bill at the proper time. Here the Court followed the New York case of *Allen* v. *The Merchants' Bank*, *infra*, and held the company liable for the acts of its agent. The case of *Tyson* v. *The State Bank of Indiana*, *supra*, was cited and approved. *Chapman* v. *McCrea, et al.* (1878), 63 Id. 639, is to the same effect.

The law upon the question seems to have remained unsettled in *Michigan* until the case of *Simpson* v. *Waldby & Clay* (1886), 63 Mich. 439, came before the Supreme Court of that State. The action was brought to recover a balance claimed to be due from the defendants to the plaintiff in respect of five drafts drawn by the latter upon a party in Vermont. The drafts were made payable to the order of the defendants, who undertook the collection of the same, and forwarded them to the First National Bank at St. Albans, who after collecting, sent its own draft on New York to defendants for the money. It appeared that a large number of drafts had been drawn by and upon the same parties before, and collected in the same manner. The defendants claimed that the amounts of the last three drafts were never received by them owing to the failure of the St. Albans bank, as a draft or drafts of that bank upon New York received by them was protested and not paid in New York. In the opinion Justice MORSE says: "The question is * * directly before us. What is the law of the case when a person steps into a bank, in the ordinary course of business dealings, and entrusts to it the collection of a draft drawn upon some person residing at a distance, in case the home bank, through the

failure or dishonesty of another bank, selected by itself, never receives the money upon such draft, though the same is paid by the drawee? In the absence of any agreement in regard to the matter, who must bear the loss in case the home bank has not been at fault in the selection of its agent or agents? There is a conflict of authority upon this proposition, and, as it has never been settled in this State, we must be guided and governed in our action by what seems to us the most correct view in justice and on principle." After reviewing the authorities, and especially the case of *Mackersy* v. *Ramsay*, *supra*, he continues: "the ruling in that case squarely covers the point in issue here, and to my mind is the better doctrine, and most in accord with principle. The learned jurists holding otherwise all admit that if a person entrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers or employees. I cannot see why any different rule should prevail in the collection of a foreign bill. It is, in every case that I have examined, sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore impliedly from the very nature of the course of business, assents to the employment of such persons and makes them his agents. This reasoning does not strike me as sound. If I leave an indorsed note against persons in my own town for collection and consequent demand and protest, I know that some agent or employe of the bank will do the work or some part of it, and I do not know or inquire who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this. If I entrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or correspondent abroad of their selection, not mine, of whom I know nothing and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers. In each case, the bank holds itself out for a consideration to collect my paper, and it can make no difference whether the compensation is great or small. In each case, it selects its own agents in the premises. In each case, I have no part in or control over such selection. In each case, there is no privity between the party selected and myself. I fail to perceive why in the one case more than the other I adopt the immediate party collecting or protesting the bill as my agent. I cannot find any good reason for making this particular case of the collection of a foreign bill, an exemption to the general rule of agency."

The *New Jersey* decisions follow those of New York. In *Titus & Scudder* v. *The Mechanics' National Bank* (1871), 35 N. J. Law (6 Vroom) 588, after duly considering the previous cases upon the question *pro* and *con*, the Chancellor expressed himself thus: "In this conflict of authorities, the weight of mere numbers ought not to govern. We should rather look for authority to those courts which

usually decide upon principles acknowledged by the courts of this State, and by whose decisions we are accustomed to be guided. The courts of England are the sources from which we derive our legal maxims, and those of New York have adhered more closely to the rules of the common law which are our guide, than courts of other States. But this consideration alone is not sufficient to determine a question like this; we must look to the principles adopted by us which control it. One cardinal and well-established principle is, that every one shall be liable for the acts of his agents chosen by himself. This, when applied to such a case is founded in equity and good sense. A dealer who deposits a draft on a distant city, in a bank in his own town, has no choice of their agent or correspondent. It is the business of a bank to provide proper agents or correspondents for this service, when they adopt it, as most banks do, as part of their regular business."

In *New York* the matter has been very much debated upon, but seems to be settled in favor of the liability of the bank for the acts of its correspondent. In the case of *Allen* v. *The Merchants' Bank of the City of New York* (1839), 22 Wend. (N. Y.) 215, the bench was composed of the Chancellor and twenty-three Senators, who were divided in opinion, fourteen being in favor of the liability of the bank and ten against it, the Chancellor being one of the minority. The case had been decided in the Supreme Court of that State and verdict given in favor of the bank in 1836, 15 Wend. (N. Y.) 482, and the plaintiff appealed. The decision was reversed, Senator VERPLANCK putting the case as follows: "A bill of Exchange drawn in New York upon a person resident in Philadelphia, is deposited *for collection* in a New York bank, is received for that purpose, and duly transmitted to their correspondent and agent, a Philadelphia bank, the notary of which is guilty of a neglect, whereby on refusal to accept at Philadelphia, payment from the New York drawer or endorser is lost. Is the New York bank first receiving this paper for collection, responsible for the loss or damage arising from the default of its Philadelphia agent? It is well settled in this State that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker or other parties, upon the default or refusal to pay or accept. The ground of this rule is, that the acceptance of negotiable paper thus deposited for collection forms an implied undertaking to make the demands and give the notices required by law or mercantile usage for the perfect protection of the holder's rights against all previous parties, for which undertaking the use of the funds thus temporarily obtained or of the average balances thereof, for the purposes of discount or exchange, forms a valuable consideration. Had we no express authority on this head, I should consider the acceptance by a bank of paper for collection from a customer, in the usual course of his business, as sufficient evidence of a valuable consideration. The whole ordinary business of a bank with its dealers, is one of mutual profit or accommodation, and must be taken together (unless some part is separated by

express understanding) and it is not for a bank to allege or for a Court to consider * * that a collection in a particular place must be regarded as a gratuitous favor. If accepted at all, the general profits and advantages of the business, of which this may perhaps be an unproductive part, form a good consideration for the undertaking. This, however, is not an open question, after the decision of this Court in the two cases against the Bank of Utica." [*Smedes* v. *Bank of Utica* (1823), 20 Johns. (N. Y.) 372; S. C. (1824), 3 Cowen (N. Y.) 662; and *McKinster* v. *Bank of Utica* (1832), 9 Wend. (N. Y.) 473.] He points out the wide difference existing, as well by positive law as by reason of the thing itself, between a contract or undertaking to do a thing, and the delegation of an agent or attorney to procure the doing the same thing, the contractor being bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, while the mere representative agent, discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming of his contracts and the choice of his workman, and continues thus: "Now in the case of the deposit for collection of a domestic note or bill payable in the same town, no one can imagine that this, instead of being a contract with the bank to use the paper, is a mere delegation of power to act as an attorney for that purpose. If this were so, and it should happen that by the fraud, the carelessness, or the ignorance of a clerk or teller, the only responsible parties were discharged, or the note itself lost or destroyed, it would be a sufficient defense for the bank if it could show that the directors had employed ordinary care and caution in selecting their officers; or any similar defense which would be good in the mouth of an attorney in fact, or a steward acting in good faith for his principal, who had been defrauded in any transaction. * * The natural and general understanding of men of business is * * that of an implied agreement with the bank itself, of whose officers and agents they have no knowledge, and with whom they have no privity of contract * * Is there anything in the mere fact of the paper being payable in another city, and therefore requiring the aid of other agents, sufficient to take that case out of the general rule? In the deposit of a note for collection, payable in the same place, the holder is equally aware that the bank cannot personally attend to the collection, and its management must be left to some one or more competent agents. But he makes an implied contract with the bank that the proper and expedient means shall be used to collect his note. So he does as to a foreign debt; and in each case he alike presumes that proper agents will be employed. In neither case has he any knowledge of the agents or privity with them. I can perceive no reason for liability or exemption from liability in either case which does not equally apply to the other." He draws a distinction between cases where the bank receives the paper merely for transmission to its correspondents and cases in which it receives for collection, saying: "The bank, if its officers think fit, and the dealer will consent, may vary that liability in either case. It may receive

the paper only for transmission to its correspondents. That would form a new and different contract, and would limit the responsibility to good faith and due discretion in the choice of an agent. But if this be not done, or unless there be some implied understanding on the subject, I see no difference between the responsibility assumed in the undertaking to collect foreign bills, and that for collecting domestic paper, payable at home. It is assumed in the same manner, in the same words and in the same consideration."

The proper construction to be put upon all questions of this kind is expressed by the same learned Judge in these words: "In all these cases, we are not to look to the necessity of the employment of distant or under agents. We are to look to the contract itself. *Legem enim contractus dat.* We are to look whether the contract be only for the immediate services of the agent, and his acting faithfully as the representative of his principal, doing for him, in the business confided to his care, what the principal is not able or willing to do for himself, or whether the contract looks mainly to the thing itself to be done, and the undertaking be for the due use of all the proper means for its performance. In the one case, the responsibility ceases with the limits of the personal services undertaken; in the other, it extends to cover all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed." The case of *Ayrault* v. *The Pacific Bank* (1872), 47 N. Y. 570, is to the same effect.

The same doctrine prevails in *Ohio, Reeves, Stephens & Co.* v. *The State Bank of Ohio* (1858), 8 Ohio St. 465, being the leading case. In it, Justice BRINKERHOFF considers the opinions in the New York case of *Allen* v. *The Merchants' Bank of New York, supra,* very fully and upholds the decision in that case: "On the whole looking at the question in the light of principle, and of what seems to us to be a sound legal policy, we prefer to adopt the doctrine of the Courts of England and New York, as now established."

The rule in *South Carolina* would seem to follow that of New York, for in the case of *Thompson* v. *The Bank of the State of South Carolina* (1836), 3 Hill (S. C.) 77, where the plaintiff deposited a note, endorsed to him by the payee in the branch bank at Camden for collection. At maturity, it was not paid and was protested for non-payment by the bank notary, but no notice was given to the indorser or to the plaintiff who brought action, for the non-performance by the bank of its undertaking to collect, and to give notice to charge the indorser. In delivering the opinion of the Court, by which the bank was held liable, Justice EARLE said, "Whosoever undertakes an agency, engages likewise to employ an adequate degree of skill, and to use a reasonable degree of diligence. In this case, the bank engaged for the exercise of so much skill, in the particular part of business, as to perform the duty of collecting the note; and * * of doing whatever was necessary to charge those to whom the plaintiff might resort for payment; and * * that it would omit nothing which reasonable diligence would enable it to perform."

The rule as established by the preceding decisions, is supported by

those of the Supreme Court of the United States. In *Exchange National Bank of Pittsburgh* v. *Third National Bank of the City of New York* (1884), 112 U. S. 276, the action was brought to recover damages for the alleged negligence of the defendant in regard to eleven drafts or bills of exchange, endorsed by the plaintiff to the defendant for collection. The facts showed that the drafts were drawn at Pittsburgh, to the order of one Baldwin and by him endorsed, on a company in New Jersey; that they were discounted before acceptance, by the plaintiff for the drawers; that they were transmitted for collection, before maturity by the plaintiff to the defendant; that they were sent by the defendant to its correspondent, the First National Bank of Newark; that the drafts were presented; that they were addressed to "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J."; that the acceptance was made by Conger in his own name, as follows: "Accepted, payable at the Newark National Banking Co. Walter M. Conger," that when the acceptance was taken, the time of payment was so far distant that there was sufficient time to communicate to the plaintiff the form of the acceptance, and for the plaintiff thereafter to give further instructions as to the form of acceptance; that the Newark bank held the drafts for payment, but the plaintiff was not advised of the form of acceptance until some time afterwards, and two of them were returned to it by the defendant, the drawers and endorsers being then insolvent. The negligence alleged was the not obtaining acceptance of the drafts by the company, or having them protested for non-acceptance by it, or giving notice to the plaintiff of such non-acceptance, and in failing to give notice that the company would not accept, or that Conger would not accept them in his official capacity. The elaborate opinion of the Court, examining all the previous decisions both in this country and in England, was delivered by Justice BLATCHFORD: "The question involves a rule of law of general application. Whatever be the proper rule, it is one of commercial law. It concerns trade between different and distant places and in the absence of statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes or localities, but according to those principles which will promote the general welfare of the commercial community. Especially is this so when the question is presented to this tribunal, whose decisions are controlling in all cases in the Federal Courts.

"The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark Bank for collection. This distinction is manifest; and the question presented is, whether the Newark Bank, first receiving these drafts for collection is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the New York Bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder

against previous parties to the paper. From the facts found, it is to be inferred that the New York Bank took the drafts from the plaintiff, as a customer, in the usual course of business. * * The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. The contract then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of the contract; and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service." Continuing, he adds: "The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself and is not obliged to look to inferior or distant under contractors or sub-agents, when default occurs injurious to his interest." Alluding to the means whereby a bank may relieve itself of this responsibility the same learned judge says: "Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent and thus make a different contract and become responsible only for good faith and due discretion in the choice of an agent. If this is not done or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where, from the nature of the business it was evident he must employ sub-agents. The distinction recurs between the rule of merely personal representative agency and the re-

sponsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent and for his faithful conduct as representing his principal, the responsibility ceases with the limit of the personal service undertaken. But where the contract looks mainly to the things to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used."

In the case of *East Haddam Bank* v. *Scovil* (1837), 12 Conn. 302, a bill was drawn in Great Britain in favor of the defendant, upon merchants in New York, accepted by them, and subsequently endorsed by the defendant and one Ingham for the purpose of being transmitted to the plaintiff bank for collection, the sole interest being in the defendant, the endorsement by Ingham being merely for the purpose of accommodation. The plaintiff bank enclosed the bill with others and sent them to the Merchants' Exchange Bank of New York for collection. At maturity the bill was presented for payment, and being dishonored was protested, and due notice thereof given to the drawer, but none to the plaintiff, defendant or Ingham. Plaintiff subsequently credited the amount to Ingham, who drew his check in favor of defendant, which plaintiff honored. The acceptors of the bill were insolvent before the bill became due, and the plaintiff claimed the money as money paid under a mistake and misapprehension of facts, that it had not been guilty of negligence or default of duty; that it was not by law bound or obliged to give any other notice to the defendant of the non-payment of the bill than that given; that if any other notice was by law necessary, the defendant had received it; that the Merchants' Exchange Bank was not the agent of the plaintiff in respect of this bill; and that the plaintiff was not liable for any default or negligence of that bank in regard to it, if any such default or negligence existed, which it denied: Justice HUNTINGTON in delivering the opinion of the Court in support of the theory that the Merchants' Exchange Bank was not the agent of the plaintiff, upon the ground that it was necessary to transmit to a reputable correspondent according to the usual course of business for collection, and that such facts were known to the defendant, remarks: "It cannot justly be claimed, that the plaintiffs should have become insurers against the defaults of their correspondents. Such a doctrine would be as inequitable, as it might be oppressive and ruinous to banks who are merely the medium through which the holders of bills and drafts payable in other States transmit them for collection. If they act in good faith in the selection of an agent to protect the interests of the holder of the bill, in cases where it is obvious an agent must be selected for such purpose, what principle of justice or commercial policy requires, that they should be held liable for any neglect of duty on the part of such agent? * * * The mode now adopted and in general use, is well calculated to insure collections with promptitude, at a trifling expense, and without trouble to the holder. It is highly reasonable he

should assume the risk of the defaults of the collecting agent, rather than the bank, who merely transmit the bill, and select the agent, with the consent of the holder, and with a perfect knowledge on his part that such selections must be made."

"The general duty of an agent who receives for collection a bill of exchange," says the Court in *Merchants' & Manufacturers' Bank* v. *Stafford Bank* (1877), 44 Conn. 564, "is to use due diligence in presenting the same for acceptance, and in presenting it for payment, if it has been accepted, and to give the holder and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the instructions to the agent, or of the contract which the agent has entered into with his principal. The agent is also required to protest, in case of non-acceptance or non-payment, if protest is not forbidden, and to send the protest to the holder."

To this may be added, the remark of Justice ELLSWORTH in *The Bridgeport Bank* v. *Dyer* (1848), 19 Conn. 136: "No principle of law is better settled than that a known practice, or one belonging to a particular branch of business is sufficient evidence of the understanding of the parties, when contractiug in relation to that business, unless there be evidence to the contrary."

In the case of *The Ætna Insurance Company* v. *The Alton City Bank* (1861), 25 Ill. 221, although the facts as agreed upon between the parties clearly showed that the bill in question was received for collection, Justice WALKER treated it as if received for transmission for collection, and held the bank not liable for the acts of its correspondents. "When received for transmission, it [the bank] has fully discharged its duty by sending the instrument in due season to a competent reliable agent with proper instructions for its collection. This is manifestly the rule clearly announced in a large majority of the adjudged cases." This statement of the law is no doubt true where the bank receives the paper for transmission for collection, but not where, as the agreed facts in this case show, such paper is received for collection. The distinction is shown by the cases of *The Bank of Washington* v. *Triplett & Neale*, *infra*; *Allen* v. *The Merchants' Bank of New York City*, *supra*; and *Jackson* v. *The Union Bank*, *infra*; all of which are cited and referred to in the opinion. There is no doubt, however, that the learned Judge treated the bill as received for transmission, contrary to the facts, for in the last paragraph of the opinion he continues: "In this case it appears that the defendants received the bill in controversy for transmission for collection, and in due season forwarded it to their correspondents at the residence of the drawees. That they were competent and reliable, and that defendants in no way contributed to any loss that may have occurred. If, then, any liability has been incurred to the plaintiffs, it is by the St. Louis house, who became their agents, and not by the defendants." It may be difficult to define what amounts to a receipt for collection, and what is a receipt for transmission for collection, but still when the facts of the case absolutely

show that the document in question was received for collection there can be no reason for holding it as received for transmission only.

The case of *Fay & Co.* v. *Strawn* (1863), 32 Ill. 295, was one wherein the appellants were bankers, who had received from appellee a draft payable to appellants for collection, which they in turn had endorsed over to their correspondents, who failed three days after collecting the money without having remitted it to the appellants. The appellants were adjudged not liable, but it would seem solely on account of a special contract, for from the opinion it is gathered, that when first applied to, they positively refused to undertake the collection of the draft; when they were applied to a second time, they only agreed to send the draft forward, upon the condition that they were to incur no liability, and that the correspondents were to transmit the collection to the appellants by express.

The *Iowa* cases maintain the theory, that "The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the sub-agent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him; the party employed with his assent, to make the collection, must therefore be regarded as his agent. A sub-agent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is in such a case, a privity between the sub-agent and the principal, who must, therefore, seek a remedy directly against the sub-agent for his negligence or misconduct. These familiar rules of the law applied to the case, relieve it of all doubt when considered in the light of legal principles." BECK, J., *Guelich* v. *The National State Bank of Burlington* (1881), 56 Iowa, 434.

In *Hyde & Goodrich* v. *Planters' Bank* (1841), 7 La. 560, the action was brought to recover damages occasioned through the negligence of a notary, but the Court held it would not lie, as "to make the defendants responsible for his neglect of official duty on the part of the notary, would be rendering them the sureties of the officer; it would be changing the ground upon which alone they can be held liable, to-wit: that of negligence in the discharge of their duty to their principals." This is followed in *Baldwin* v. *The Bank of Louisiana* (1846), 1 La. Ann. 13.

In *Maryland*, the law would seem to be against the liability of the bank. In *Jackson* v. *The Union Bank of Maryland* (1823), 6 Har. & J. (Md.) 146, the plaintiff charged the defendant with negligence with reference to a bill of exchange drawn by the plaintiff upon a party in Washington, D. C., and placed in defendants' hands for collection. The bill was a foreign one and was forwarded by defendants to their agents in Washington. The demands for payment and protest were made on the fourth day according to the custom of the banks in the District. In the opinion of the Court, which discharges the defendants, Justice BUCHANAN dwells

upon the custom of the defendants to collect paper for their customers through the agency of other banks; also upon the fact that the plaintiff was a customer, "and must be supposed to have had a knowledge of the uniform and established mode of making such cohections by the banks," further, he takes the point that "the placing" of the bill "with the defendants for collection was equivalent to an agreement that it should be sent by them for that purpose to some bank in the District of Columbia, * * their established agent, * * and if that agent did, in conformity with the custom * * neglect to cause demand and protest to be made on the proper day, the defendants are not chargeable with any negligence, or other improper conduct." Similarly, *Citizens' Bank of Baltimore* v. *Howell & Brothers* (1855), 8 Md. 530.

In *Fabens* v. *The Mercantile Bank* (1840), 23 Cush. (Mass.) 330, it was agreed, that the usage of the banks in Massachusetts, was to collect notes, the makers of which resided without the State, through some bank in the place of the maker's residence, if there were any bank in such place in good standing, and to transmit the notes to such bank for that purpose. A notice had always been posted up in the bank in question, "that the cashier may receive notes and bills of exchange for collection, for which neither the bank, nor any officer thereof shall be held accountable for any irregularity in notifying." Here Chief Justice SHAW said: "We think this question must depend upon the usage and custom of merchants and bankers, and the implied obligation upon the latter, resulting from their relations, as no special contract was made, and no special instruction given in the present case. We think it very clear upon principle and authority that by a general usage, now so well understood as safely to be considered a rule of law, when a bank receives a note for collection, it is bound to use reasonable skill and diligence in making the collection, and for this purpose is bound to make a reasonable demand on the promisor and in case of dishonor, to give due notice to the indorsers, so that the security of the holder shall not be lost or essentially impaired by the discharge of indorsers. * * But it is equally well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as part of the same doctrine, it is well settled, that if the acceptor of a bill or promisor of a note, has his residence in another place it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of residence of the promisor, and the same rule shall then apply, as if on the face of the note it was payable at that place. * * We are therefore of opinion, that the defendants had performed their duty, when they transmitted the note to a solvent bank in good standing, and were not responsible for the misfeasance or negligence of that bank."

The case of *The Dorchester and Milton Bank* v. *The New England Bank* (1848), 1 Cush. (Mass.) 177, supports these principles. In that

case, it was contended by plaintiff's counsel that the defendant bank had no right to place the bills, which had been placed in its hands for collection, in the hands of another bank (the bills were payable at Washington and the defendants had no correspondents there), on the ground that an agent has no authority to delegate his authority to a sub-agent without the assent of his principal. This contention was, however, denied by Justice WILDE: "This, no doubt, is generally true, but when from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. * * If the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. * * The defendant's liability was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. * * The usage of a bank is binding on all persons dealing with the bank, whether they know of the usage or not."

The Courts in *Mississippi* hold that in the case of a receipt for collection, the bank is not liable: *Tiernan et al.* v. *Commercial Bank of Natchez* (1843), 7 How. (Miss.) 648, where a notary had been negligent in collecting a domestic bill; *The Agricultural Bank of Mississippi* v. *The Commercial Bank of Manchester* (1846), 7 S and M. (Miss.) 592, a case of a foreign bill; *Bowling* v. *Artnur* (1857), 34 Miss. 41, where it was held that the notary was liable directly to the payee. In *Third National Bank of Louisville* v. *Vicksburg Bank* (1883) 61 Miss. 112, Justice COOPER followed the ruling in the previous cases, while Chief Justice CAMPBELL delivered a dissenting opinion: "I think the rule which prevails in England, and New York, New Jersey, and Ohio, and which is preferred by several eminent text writers, is the true one, and that a bank taking paper for collection is responsible for the default of its correspondent. I do not find fault with the cases cited from our own reports. They were where the claim was handed to a notary, and it was properly held that he was the agent, not of the bank, but of the owner of the paper, and that the bank was not responsible for the default of the notary. Where protest becomes necessary or proper, the paper must be handed to a notary, and the owner of the claim knows that, and is conclusively presumed to have authorized the bank to commit the paper to a notary if it should become necessary to protest it. * * * To this I agree, but I am unable to assent to the doctrine that a bank is not responsible for its own agents in the conduct of its regular business. It seems to be settled that a collection agency which takes a claim for collection at a distant point is responsible for the acts of its agent to whom the claim is sent for collection. I am not able to draw a distinction between a collection agency, by that name, and a bank, which is a collection agency, where it undertakes to collect claims for customers."

In the case of *Capitol State Bank* v. *Lane* (1876), 52 Miss. 677, the draft was a foreign one and was not protested, and the Court held the bank liable, saying: "As a legal proposition, it is undeniably true that a bank which receives a note or bill for collection is bound to use

due and proper diligence in making demand and giving notice and causing protest to be made, so as to hold all parties liable, and in default of such diligence, the bank itself becomes responsible to the party who deposited the note or bill."

The decisions in the State of *Missouri* also uphold the doctrine "that where the bank with which the bill or draft is placed or deposited for collection, uses due diligence and transmits the paper to a proper correspondent for collection, with proper instructions for the collection of the same, its responsibility is at an end, unless by some after act it makes itself responsible: *Daly* v. *Butchers' and Drovers' Bank* (1874), 56 Mo. 94. In this case, that of *Gerhardt* v. *The Boatman's Saving Institution* (1866), 38 Mo. 60, was much commented upon by the Court. It was a case where the defendants with whom the plaintiff kept his regular deposit account, had delivered to it negotiable promissory notes for collection. The defendant employed a notary to do all its notarial business, and had required him to to give a bond, and appointed him by the year. The action lay for his negligence in not giving notice of dishonor, whereby the endorser was discharged, and the Court held the defendant liable for his acts, stating that it "having appointed the notary by the year, and required a bond for the faithful performance of his duties, made him its agent and an officer of the bank," and cited in support of its opinion the passage from Story on Agency. § 452, *supra*. At the same time the Court said: "If the subject of the controversy were a foreign bill of exchange, it might present an entirely different aspect."

One of the earliest cases in *Pennsylvania* upon the question is *The Mechanics' Bank of Philadelphia* v. *Earp* (1834), 4 Rawle (Pa.) 384; here the defendant drew upon parties in Virginia, and presented the bills to the bank to be transmitted for collection. The bills were not paid, and the bank refused to permit defendant to transfer his stock. In delivering the opinion of the Court, Justice ROGERS points out the distinction between the case of paper received for transmission for collection, and simply for collection: "If the undertaking of the bank was to *collect*, and not merely to *transmit*, they would be answerable for their Virginia correspondent; and this I understand to be the principle of the case of *Van Wait* v. *Woolley*, [*supra*] * * If the jury should be of opinion, that the Mechanics Bank undertook to *collect* the money, then it will be necessary to inquire, whether the bank of Virginia has done its duty, and what is the extent of the liability of the defendants. * * The bank would be liable in damages only as any other agent to his principal, to the extent of the damage which may have been sustained by their neglect." The next case which occupied the attention of the Court in that State, was that of a home bill or note: *Bellemire* v. *The Bank of the United States* (1838), 4 Whar. (Pa.) 105, wherein Chief Justice GIBSON expressed the rule as follows: "It has been ruled by this Court * * that a bank employed to transmit for collection, is bound to concern itself with the act of transmission alone; and that its correspondent becomes the agent for subsequent measures. It

is suggested, however, that a bank which has undertaken the whole business of collection, may be affected by other considerations ; but though it be the holder by endorsement, there is nothing peculiar in its position. It is invested with the apparent ownership only to authorize it to present for payment; and standing in all other respects on the ordinary footing of an agent, it is sufficient to exonerate it that it has acted in good faith, and, though not to the best advantage, according to the regular and accustomed course of the business. * * A bank is compelled by the incorporeal nature of its essence, to act by the instrumentality of agents; and when it employs its own servant with the usual instructions, it performs its implied promise to use ordinary diligence. * * It performed its undertaking when, for the purposes of presentation and notice, it put it into the hands of its own notary." In this case the Chief Justice took the view that the bank acted gratuitously, and according to the usual practice, and that there was no recourse. This was followed by the case of *Wingate* v. *Mechanics' Bank* (1848), 10 Pa. 105, in which the action was for damages for undertaking to collect a foreign bill for a valuable consideration. In this case, it appeared that the bank had put up in its premises placards, and also distributed them to its customers, offering to collect drafts on certain points for seven per cent. The notes were not collected and no notice was given. Justice COULTER in delivering the opinion of the Court dwells upon the difference between a draft handed to a bank for collection and one handed to it for transmission for collection: "Was the contract to collect the notes by the defendants for seven per cent., established ; and if so, were they guilty of such negligence, under that contract, as to make them liable to the plaintiffs for the loss incurred in consequence of it? * * The law is clear, that if an agent undertake to do a specified thing for a stipulated reward, he is bound to exercise due diligence to accomplish what he has agreed to do ; and to observe good faith towards his principal in every step, either of success or failure, towards accomplishing the end. The law implies a promise from brokers, bankers, or agents, and attorneys, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform ; in which if they fail, an action lies to recover damages for the breach of their implied promise. * * If the contract or agreement by defendants was not to collect the notes deposited, but merely an engagement to transmit them to a responsible person, * * the defendants were not liable, because they had committed them to a bank in good credit." With regard to the question of the obligation to give notice he referred to Story on Agency, § 208, where it is laid down that, "it is the duty of agents to keep their principals advised of their doings, and to give them notice in a reasonable time of all such facts and circumstances as may be important to their interests," and continuing, observed: "In the exercise of good faith to his principal, the agent ought to be held to the giving such notice, whether the agent be an individual or a bank ; for banks are subject to the settled law of contracts, as well as individuals."

The still more recent case of *Merchants' National Bank of Philadelphia* v. *Goodman* (1885), 109 Pa. 422, shows that, "The agreement to transmit for collection is a contract between the bank and its customer; the valuable consideration which supports the agreement as a contract, is the use of the money to be collected by the bank so long as it shall be allowed to remain in their hands after it has been collected. This binds the collecting bank to do all that is incumbent on them to do; and that entire duty, * * is discharged when the check or draft is transmitted to a responsible sub-agent to collect the money. The agent to whom the instrument is sent to make demand for payment, then becomes the agent of the depositor or endorser, and is liable to such depositor for loss arising from failure on his part to perform the duty which is incident to an undertaking to collect the money; and such duty is not discharged when anything but money is accepted as payment, in the absence of special authority to the contrary." This was the opinion of the Court below and was affirmed as above, Chief Justice MERCUR dissenting. The case of *Lee* v. *The First National Bank of West Chester* (1880), 1 Chest. Cnty. Rep. (Pa.) 109, is to the same effect.

In *Tennessee*, the case of *Bank of Louisville* v. *First National Bank of Knoxville* (1874), 8 Bax. (Tenn.) 101, supports the ruling in favor of the exemption of the bank from liability. The action was brought against the bank and Brown, a notary public, to recover damages for their failure to protest a bill of exchange sent by plaintiff to defendant. Here the Court said: "All that is required is, that the bank receiving such bill in the first place, should act in good faith in the selection of a proper agent to protect the interests of the holder of the bill." The Circuit Court, in accordance with the New York case of *Allen* v. *The Merchants' Bank*, *supra*, had held the bank liable, and was reversed.

The *Wisconsin* courts also follow this doctrine, in the case of a note payable by a party residing at a distance from the bank's place of business, that the contract is not absolutely to make due presentment and give due notice, but to place the note in the hands of some competent and responsible agent doing business at the residence of the maker, and that having done this, it is itself discharged from liability. The case of *Stacy and another* v. *The Dane County Bank* (1860), 12 Wis. 629, shows that in such cases "there is an implied authority to employ a sub-agent, and that if the bank exercises reasonable care and skill in selecting one, it is not afterwards liable for his default." This case supports a theory that if the note was in due season delivered to a notary public at the residence of the maker, for presentment and protest, such fact would constitute a good defense upon the ground "that those officers are appointed by public authority, and that therefore, at least in the absence of any direct notice to the contrary, parties have a right to assume that they are fit and proper agents to discharge the duties of their office."

In some cases, the bank actually making the collection, has been held to assume the entire agency, and to relieve the principal from liability, thus in *The Bank of Washington* v. *Triplett & Neale* (1828), 1 Peter (26 U. S.) 25, the bank contended

that it was not the agent of the plaintiffs, but of the Alexandria Bank, from whom it received the bill, and that where an agent, employed to transact a particular business, engages another person to do it, the latter is not responsible to the principal. This was denied by the Court, as the bill was not delivered to the Alexandria Bank for collection, but for transmission, and the Alexandria Bank by transmitting as directed performed its duty, and the whole responsibility of collection devolved on the defendant bank. Chief Justice MARSHALL, who delivered the opinion, said:— "the deposit of a bill in one bank to be transmitted for collection to another is a common usage of great public convenience, the effect of which is well understood. * * The letter of [the Alexandria Bank] disclosed the real party entitled to the money, and the answer to that letter assumes the agency, if it had not been previously assumed. The Court is decidedly of opinion that the Bank of Washington, by receiving the bill for collection, and certainly, by its letter, * * became the agent of Triplett and Neale, and assumed the responsibility attached to that character."

It is submitted that the liability of a bank which has undertaken to collect commercial paper, either domestic or foreign, cannot differ from that of any other party who has contracted to do a specified thing; for the law is well settled that if a person promises or undertakes to perform a certain act, he is liable for all defaults and negligences, even though his action be gratuitous: *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909; therefore, if the paper has been placed in the hands of the bank for collection, in the absence of any express contract to the contrary, it is properly made liable for the acts of its agents and correspondents. There is in such case an implied contract co-ordinate and commensurate with duty, dictated by reason and justice; for, whenever it is certain that a man ought to do a particular thing, the law supposes him to have promised to do that thing: *Illinois Central RR. Co.* v. *U. S.* (1880), 16 Ct. Cl. 333.

Upon this theory, which it is contended is the true one, the whole question ought properly to be made to hinge upon the contract or undertaking of the bank. Was the paper placed in its hands for collection or merely for transmission for collection? If for the former purpose, then it is liable, but if for the latter, then its liability properly ceases upon its handing the same to a responsible and well selected person to transact the business required, as has been decided by the Courts in England, and by those of Indiana, Michigan, New Jersey, New York, Ohio, and South Carolina, and by the Court in Minnesota, as shown by the principal case, and supported by the decisions of the Supreme Court of the United States as already pointed out in this annotation.

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